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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1069

JOHNSON MOTOR LINES, INC.,
Appellant,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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I

Relying primarily upon *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), appellees move to dismiss the appeal as premature. *Crescent* is inapposite. There, the time for appeal was tolled by a motion to amend *substantive findings* in the judgment. Here, the Commission's September 14th motion expressly sought a

change in the "form" of the September 11th judgment (J.A. p. 795). In its October 4th memorandum denying relief the District Court points out that the motion ". . . does not contest the court's [September 11th] ruling that the [I.C.C.] orders are invalid. . . ." (J.A. p. 822). As the September 11th judgment of the District Court finally settled the substantive questions in controversy in this Court, appellant's September 27th notice of appeal was timely. *Federal Trade Commission* v. *Minneapolis Honeywell R. Co.*, 344 U.S. 206 (1952). Indeed, the September 11th judgment was recognized as a final adjudication of the merits of the case by all appellants when they filed notices of appeal within 60 days thereafter (J.A. p. 837). Had the appeals been filed within 60 days of the October 4th order denying the Commission's motion, but more than 60 days after the September 11th judgment, the only question before this Court might well be whether the District Court appropriately declined to remand. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

Song Jook Suh v. *Rosenberg*, 437 F. 2d 1098 (9th Cir., 1971) provides an alternative answer to the motion to dismiss. There, as here, the appeal was taken during the pendency of a post-judgment motion. There, as here, the motion was denied. Holding the appeal good, the Ninth Circuit reasoned that the notice of appeal, which expressly referred to the first judgment, ". . . became effective when the judgment became final." 437 F. 2d at 1101. Thus, assuming the Commission's September 14th motion delayed the finality of the September 11th judgment, Johnson's September 27th notice of appeal, which expressly referred to the judgment, remained on file and became effective when the judgment became final.

Finally, appellees do not challenge the timeliness of the appeal of Lorch-Westway Corporation, et al. (Lorch), in No. 73-1071. Lorch intervened in the agency proceeding

in support of Johnson's certificate application and in the District Court in support of the Commission's order granting it. Should appellees' motion to dismiss this appeal be granted, Johnson requests that its Jurisdictional Statement and this Brief in Opposition to Motion to Dismiss and Affirm be considered by the Court in support of the appeal in No. 73-1071.

II

On the merits of the appeal, appellees isolate various facets of the questions presented and argue that no one of them, standing alone, warrants this Court's consideration. But, as pointed out in the Jurisdictional Statement, the method employed in the lower court's consideration and determination of the case and the scope of review utilized in reaching its judgment, *viewed collectively*, ". . . tend to merge into a single substantial question warranting plenary review by this Court" (J.S. p. 15).

Finally, the factual errors in the District Court's opinion, outlined in the Jurisdictional Statement (J.S. pp. 9-12), are not denied by appellees. Significantly, most of those errors turn on material contained in pleadings filed *subsequent* to the agency hearing. These pleadings constitute a part of the record before the agency [5 U.S.C. § 556(e)] and are therefore a part of the record certified by the I.C.C. to the District Court. However, these pleadings are *not* summarized in the abstracts of testimony and exhibits appellees commend as a substitute for the agency record the District Court must review in reaching its determination under 5 U.S.C. § 706. Thus, assuming, *arguendo*, that abstracts of testimony and exhibits before the agency were properly relied upon below,

those documents do not contain portions of the administrative record relevant and material to the decision here challenged.

Respectfully submitted,

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March 4, 1974

CERTIFICATE OF SERVICE

I, Donald E. Cross, counsel for appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 4th day of March, 1974, I served copies of the foregoing document on the parties hereto, postage prepaid by first class or air mail, as follows:

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